JAMES R. BROWNING, Clerk

No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

CENTRAL VERMONT RAILWAY, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	3
SUMMARY OF ARGUMENT	8
ARGUMENT	12
I. Pursuant to Section 3(1) of the Interstate Commerce Act the Commission possesses jurisdiction to determine that the participation of rail carriers operating within the United States in single-factor joint through rates to points in official territory while participating in combination through rates made over points within the United States on a higher level for like service from the same Canadian origins to points in the south, was unduly prejudicial to receivers in southern territory and unduly preferential of competing receivers in official territory	12
II. The District Court erred in holding that the Commission lacks jurisdiction to determine under Section 1 of the Interstate Commerce Act that a combination rate on through traffic from Canadian origins to destinations in the southern states was unjust and unreasonable "insofar as the transportation took or takes place within the United States"	22
A. Preliminary statement on jurisdictional issues	22
B. The merits	25
CONCLUSION	45
APPENDIX	46

TABLE OF CASES

Addy v. *Michigan Central R. Co.*, 269 I.C.C. 683	5
Alabama Grocery Co v. *A., T. & S.F. Ry. Co.*, 197 I.C.C. 726, 206 I.C.C. 559	42

Page

Allendale Grocery Co. v. *Charleston & W. C. Ry. Co*, 147 I.C.C. 131 .. 26
Atlantic & Y. Ry. Co. v. *Carolina Button Corp.*, 74 F. 2d 870 .... 39, 42, 43
Atlantic Coast Line R. Co. v. *Smith Bros.*, 63 F. 2d 747, cert. den. 289 U.S. 761 .... 40, 42
Atlantic Lumber Co. v. *Louisville & N. R. Co.*, 157 I.C.C. 236 42
Ayrshire Corp v. *United States*, 335 U.S. 573 .... 20, 39
Brown, E.A., Produce Co. v. *Atchison, T. & S.F. Ry. Co.*, 278 I.C.C. 433 28
Cairo Board of Trade v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 26
Class Rate Investigation, 1939, 262 I.C.C. 447 4
Consolidated Mining & S. Co. of Canada v. *N.Y.C. R. Co.*, 299 I.C.C. 231 18
Crown Willamette Paper Co. v. *Southern Pac. Co.*, 218 I.C.C. 279 29
Durham Herald Co., Inc., v. *Canadian Pacific Ry. Co.*, 280 I.C.C. 534 .. 35
East Tennessee, etc. Ry. Co. v. *Interstate Commerce Commission*, 181 U.S. 1 15
Great Northern Ry. v. *Sullivan*, 294 U.S. 458 .... 11, 28, 39
Hocking Valley Ry. Co. v. *Lackawanna Coal & Lumber Co.*, 224 Fed. 930 5
Kansas City So. Ry. v. *Albers Comm. Co.*, 223 U.S. 573 37
Lewis-Simas-Jones Co. v. *Southern Pacific Co.*, 283 U.S. 654 .. 28, 29, 31, 33, 39
Louisville & Nashville R. Co. v. *Sloss-Sheffield Co.*, 269 U.S. 217 39
Magnet Cove Barium Corp. v. *United States*, 175 F. Supp. 473, aff'd 361 U.S. 32 25
Mayo Shell Corp. v. *Baltimore & O. R. Co.*, 297 I.C.C. 133 17
New York v. *United States*, 331 U.S. 284 .... 5, 21, 39
News Syndicate Co. v. *N.Y.C. R.R.*, 275 U.S. 179 .... 28, 31, 39
Riverside Mills v. *Augusta & Savannah Steamboat Co.*, 40 I.C.C. 501 .. 42, 43
Shippers Car Supply Committee v. *United States*, 160 F. Supp. 939, aff'd 358 U.S. 45 25
St. Louis, Brownsville & Mexico Ry. Co. et al. v. *Brownsville Navigation District et al.*, 304 U.S. 295 16
St. Louis, S.W. R. Co. v. *United States*, 245 U.S. 136 15
Stevens Grocer Company et al. v. *St. L., I.M. & S. Ry. Co.*, 42 I.C.C. 396 .... 26, 27
Texas & Pacific Ry. Co. v. *United States*, 289 U.S. 627 .... 4, 13, 20, 21
Thompson v. *United States*, 343 U.S. 549 37
United States v. *Great Northern R. Co.*, 343 U.S. 562 37
United States v. *Illinois Central R. Co.*, 263 U.S. 515 .... 14, 15, 16
United States v. *Interstate Commerce Commission*, 337 U.S. 426 23
Virginian Ry. Co. v. *United States*, 272 U.S. 658 .... 36, 37, 39

STATUTES

Interstate Commerce Act, 49 U.S.C. 1 et seq.:
Section 1 .... 2, 6, 10, 12, 46
Section 1(1) 2, 32, 36, 46
Section 1(2) 2, 32, 36, 46
Section 1(4) 2, 7, 38, 46
Section 1(5) 2, 7, 23, 47

Interstate Commerce Act, 49 U.S.C. 1 et seq.—Continued Page
Section 2 ..... 2, 6
Section 3(1) 2, 3, 6, 8, 12, 14, 16, 18, 21, 23, 49
Section 6(1) 2, 48
Section 6(7) 2, 49
Section 8 ..... 2, 44, 49
Section 16(1) 2, 39, 50
Section 16(2) 2, 23, 24, 25, 50
28 U.S.C. 1253 and 2101(b) 2
28 U.S.C. 2321 23

MISCELLANEOUS

49 C.F.R. 141.0(5), Regulations of the I.C.C. for the Filing of Freight Rate Schedules 5
Rule 1.100, General Rules of Practice of the I.C.C. 23, 24

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OPINION BELOW

The opinion of the District Court (R. 241–253) is reported at 182 F. Supp. 516. The decision of the Interstate Commerce Commission dated May 7, 1958 (R. 60–79) is reported at 303 I.C.C. 743. The orders of the Commission dated May 7, 1958 (R. 80–81) and March 11, 1959 (R. 239–240) are not reported.

JURISDICTION

The judgment of the District Court was entered on March 7, 1960 (R. 241, 253). A motion for reconsideration, timely filed, was denied on March 26, 1960 (R. 261). Notice of Appeal by the Commission was filed in the District Court on May 24, 1960

(R. 267), and probable jurisdiction was noted on October 17, 1960 (R. 272). The jurisdiction of the Court upon appeal rests on 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

Sections 1 (1)(a) and (2), 1(4), 1(5); 3(1); 6(1), 6(7); 8; 16 (1) and (2) of the Interstate Commerce Act, 49 U.S.C. 1 (1)(a) and (2), 1(4), 1(5); 3(1); 6(1), 6(7); 8; 16 (1) and (2). Pertinent portions of these sections of the Interstate Commerce Commission are reproduced in the Appendix, *infra*, pages 46–50.

QUESTIONS PRESENTED

Asbestos moves from origins in Canada to consignees in official territory on single-factor joint through rates over the lines of Canadian and American rail carriers which meet at interchange points within the United States. Asbestos moves from the same Canadian origins and through the same interchange points to competing consignees in southern territory on combination through rates at a higher level, made over a point within the United States, consisting of (1) a proportional rate from the Canadian origins to the interchange points in the United States and (2), local rates from such interchange points to the south.[1] The following questions are presented by this appeal:

[1] There is one exception. The applicable combination through rate on asbestos waste from Danville, Quebec, Canada, to the points in the south is made over Baltimore, Maryland, and consists of a joint through rate from Danville to Baltimore and class or commodity rates beyond. (R. 64, 65.) Although conceding the Commission's power over joint rates, (R. 246) never-

(1) Whether the District Court erred in failing to sustain the Commission's determination that the participation of rail carriers operating within the United States in single-factor joint through rates to points in official territory, while participating in combination through rates made over points within the United States on a substantially higher level, for like service from the same Canadian origins to points in the south, was unduly prejudicial to receivers in southern territory and unduly preferential of competing receivers in official territory, in violation of section 3(1) of the Interstate Commerce Act, 49 U.S.C. sec. 3(1).

(2) Whether the District Court erred in holding that the Interstate Commerce Commission lacked power to determine the reasonableness and justness of the entire combination through rate between the Canadian origins and points in the southern territory made over points within the United States.

STATEMENT

The Central Vermont Railway, Inc. and numerous other rail carriers, including the Quebec Central Railway Company and the Canadian National Railway Company, (hereinafter referred to as the rail carriers) which operate in the United States, and which participate in the movement of crude asbestos and asbestos fiber from producing points in Canada to points in the United States, brought this action to set aside the report and order of the Commission dated

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theless, even as to these rates applying on asbestos waste, the judgment of the District Court prevents any remedial action by the Commission.

May 7, 1958 (R. 60–81), as clarified by the order of the Commission entered March 11, 1959 [2] (R. 239–240).

Crude asbestos and asbestos fiber are produced at points located in the Province of Quebec, approximately 100 miles or less north of the United States-Canadian border.[3] Asbestos is shipped from these origin points over the lines of the Quebec Central Railway Company and the Canadian National Railway Company (hereinafter called the Canadian lines) and connecting United States rail carriers to points in the United States located in official territory [4] such as Chicago, Ill., Ambler, Pa., and Manville, N.J., and to destinations in the southern territory such as Charlotte, Davidson and Marshville, N.C., and North Charleston, S.C.

The Canadian and United States rail carriers have established and maintain applicable single-factor joint through rates [5] on asbestos from the Canadian origins

[2] The order of March 11, 1959, among other things, dispelled any doubt that the method of adjusting rates to remove the unlawful discriminations was left to the option of the rail carriers. *Texas & Pacific Ry Co.* v. *United States*, 289 U.S. 627, 650.

[3] The following producing origin points are located on the line of the Quebec Central Railway Company: Black Lake, Coleraine, Thetford Mines, Robertson and East Broughton. The following producing origin points are located on the line of the Canadian National Railway Company: Warwick, Danville and St. Malachie.

[4] Official territory, broadly speaking, lies east of the Mississippi River and north of the Potomac and Ohio Rivers. *Class Rate Investigation, 1939*, 262 I.C.C. 447, 457.

[5] A joint rate is a rate which extends over the lines of two or more carriers and is made by arrangement or agreement

to points in official territory. Asbestos moving from the same Canadian origins to destinations in southern territory is treated differently, ratewise, by the rail carriers.[6] Through shipments of asbestos to points in the southern territory move on combination through rates[7] made over points within the United States which are on a higher level for like service. These are composed of the following factors: (1) a proportional rate[8] restricted to apply only on traffic destined to points in the United States, published by the Canadian carriers from the origin points in Canada to East Alburgh and Newport, Vt., both of which happen to be customs ports of entry; and (2) class rates or commodity rates[9] maintained by the United

between the carriers and is evidenced by concurrence or power of attorney.

[6] The one exception is asbestos waste from Danville to points in the south. See footnote 1, *supra*.

[7] The term "through rate" is construed to mean the total rate from point of origin to destination. It may be a local rate, a joint rate, or a combination of separately established rates (49 C.F.R. 141.0(5) Regulations of the I.C.C. for the Filing of Freight Rate Schedules).

[8] A "proportional rate" is a part of a through rate, *Hocking Valley Ry. Co.* v. *Lackawanna Coal & Lumber Co.*, 224 Fed. 930, 931, and is a rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies, or (2) a subsequent transportation from a point to which the proportional rate applies, (3) or both, cf. *Addy* v. *Michigan Central R. Co.*, 269 I.C.C. 683, 686.

[9] "Class rates" are rates that apply on several classes of traffic specified in the controlling classification or published exceptions thereto. A *commodity rate* is published to apply on a specific commodity or group of commodities, generally described in the tariff containing the rate, as distinguished from a class rate. *New York* v. *United States*, 331 U.S. 284, 290, fns. 1–3.

States carriers to points in southern territory such as Charlotte, Davidson and Marshville, N.C., and North Charleston, S.C. East Alburgh and Newport, Vt. are located three and five miles south of the international boundary, respectively.

The proceeding was instituted before the Commission by receivers located in North and South Carolina, who are engaged in the manufacture, sale and distribution of asbestos products and who are adversely affected by this rate disparity.[10] Their complaints before the Commission (R. 18–24, 32–57) allege: (1) that the rates charged by the rail carriers for the transportation of crude asbestos and asbestos fiber from the Canadian mines to the southern destination points were and are unreasonable and unjust in violation of sections 1 and 2 of the Interstate Commerce Act (49 U.S.C. sections 1 and 2); and (2) that the rail carriers violated section 3(1) of the Interstate Commerce Act (49 U.S.C. 3(1)) by the maintenance of unduly prejudicial rates on asbestos from the Canadian mines to the shippers in southern territory and unduly preferential rates on the same commodities from the same origin points to their competitors in official territory.

After appropriate proceedings, the Commission issued its report of May 7, 1958 (R. 60–81) in which it found the rates to be both unduly preferential and prejudicial, in violation of Section 3(1), and unjust

[10] The first complaint was filed with the Commission on June 22, 1951, and similarly affected receivers filed complaints on December 6 and 13, 1954. In all, the consolidated proceeding before the Commission involved five separate complaints by adversely affected southern receivers.

and unreasonable under Section 1 (4) and (5) of the Act. It ordered the carriers to establish rates for shipments to the complainants' plants in southern territory which would not exceed the rates to points in official territory by more than specified amounts.[11] The Commission found that "the complainants * * * made shipments as described and paid or bore the charges thereon, were damaged, and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases * * * found to have been just and reasonable" (R. 78). On March 11, in denying petitions for reconsideration, it clarified its prior order so as to make clear that the carriers were left with alternatives in removing the discriminations violative of Section 3(1) (R. 239–240).

On March 12, 1959, the rail carriers instituted an action in the District Court seeking to set aside the report and order of the Commission entered May 7, 1958.[12] Thereafter, on March 7, 1960, the District

[11] For example, using Thetford Mines as a representative origin point, the Commission found (R. 75) that the commodity rates of 97 cents, minimum 40,000 pounds on crude asbestos, and 86 cents, minimum 46,000 pounds on asbestos fiber, are about 86 percent and 80 percent respectively of what the rates would be if constructed on a combination basis similar to that used in constructing rates to the prejudiced southern destinations. In this situation the southern receivers are being charged rates at levels (Rate per mile) which are from 15 to 20 percent higher than the rate level applicable to the preferred points in official territory.

[12] On April 6, 1959, a group of southern rail carriers was permitted by the District Court to withdraw as parties plaintiff from the suit. These were the Alabama Great Southern Railroad Company; Atlantic Coast Line Railroad Company; Cin-

Court rendered its opinion and order, setting aside and annulling the orders of the Commission and remanded the cause to the Commission for further proceedings in conformity with its opinion (R. 241–253). The District Court held, in substance, that the *application* of the proportional rate factor embraced in the combination through rate applicable to asbestos from origins in Canada to southern points within the United States constitutes a bar to the Commission's jurisdiction to determine the reasonableness of the through rate. The District Court did not discuss the Commission's findings of undue prejudice and preference under section 3(1) of the Act. The District Court's attention was directed to this issue by the appellants in a motion for reconsideration (R. 203). This was denied by order of the court without opinion on March 26, 1960 (R. 261).

SUMMARY OF ARGUMENT

I

The appellee rail carriers apply single-factor joint through rates on asbestos and related commodities from origin points in Canada to receivers in official territory. At the same time, these rail carriers also participate in combination through rates made over points within the United States applicable to the same commodities from the same Canadian origin points to competing receivers located in southern territory.

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cinnati, New Orleans & Texas Pacific Railway Company; New Orleans and Northeastern Railroad Company; Norfolk Southern Railway Company; Seaboard Air Line Railroad Company; and the Southern Railway Company.

The combination through rates are on a substantially higher level than the single-factor joint rates, although the transportation services rendered to the competing receivers by the rail carriers were similar. The Commission found that this disparate rate treatment created an unlawful rate relationship, in violation of section 3(1) of the Interstate Commerce Act, which unduly preferred receivers in official territory and unduly prejudiced their competitors in southern territory. The Commission required the rail carriers "according as they participate in the transportation within the United States * * * to cease and desist * * * from practicing the undue prejudice and preference."

The order of the Commission promulgated under section 3(1) of the Interstate Commerce Act is a valid exercise of its authority to prevent the rail carriers from continuing an unlawful rate relationship between competing receivers within the United States. The contention that the Commission's lack of jurisdiction over the foreign portion of the transportation also prevents it from requiring the removal of the discriminatory rate practices is completely invalid where, as here, the Commission's order is enforceable against the rail carriers operating within the United States which voluntarily participate in the unlawful rate relationship, and which are able to cut short its continuance. The mere fact that international traffic is involved does not enable the rail carriers to inflict an unduly prejudicial-preferential rate relationship upon competing shippers within the United States.

II

The southern receivers which are adversely affected by the unlawful rate relationship maintained by the rail carriers on asbestos also assailed the lawfulness of the combination through rates made over interior points within the United States which were the only applicable rates on this traffic. The Commission found the assailed rates, insofar as the transportation takes place within the United States, unjust and unreasonable, in violation of section 1 of the Interstate Commerce Act, 49 U.S.C. section 1, and that the complaining receivers were entitled to reparations.

The court below set aside the action of the Commission on the theory that the Commission possessed no jurisdiction over the foreign factor of a combination international rate. The fact that the combination through rates include factors covering transportation in Canada does not preclude the Commission from exercising its jurisdiction under section 1 of the Act to determine whether the combination through rates made over a point within the interior of the United States are just and reasonable.

The court below predicated its theory of the case upon the assumption that Newport and East Alburgh, Vt., the points over which the combination through rates are made, should be regarded as located on the border. Admittedly, the rail carriers operating within the United States could not be held responsible for the unlawfulness of the combination through rates if, in fact, such rates applied to and from the international boundary. However, no such rates were published by the rail carriers applicable on this through

traffic from origins in Canada to the receivers in the South. Had such rates been in existence, and none were alleged, it would have been the duty of the rail carriers to produce them. Further, the Commission expressly found that Newport and East Alburgh, Vt., were not on the border but were three to five miles below the border, and that the Canadian carriers performed substantial transportation within the United States.

Since there were no applicable rates published by the rail carriers to and from the international boundary, the adversely affected receivers were justified in attacking the actual rates applied for all of the transportation rather than some fictitious, nonexistent rate from the boundary. In this connection, this Court has recognized that the shippers' interest is in the total charge for the service rendered rather than the separate factors of the through rate which go to make up the total charge. *Great Northern Ry. v. Sullivan*, 294 U.S. 458. Therefore, it was incumbent upon the shippers to challenge the entire combination through rate, and it was proper for the Commission to determine the lawfulness of this rate as an incident of its power over that portion of the transportation which takes place within the United States

Lack of control over the foreign portion of the transportation is of no legal significance, where, as here, the rail carriers participate in through routes and either (1) joint through rates or (2) through combination rates based on points within the United States. Liability for the maintenance of such unlawful through rates attaches regardless of the method

of rate publication, and all of the participating rail carriers within the United States are subject to the order of the Commission.

ARGUMENT

I

Pursuant to Section 3(1) of the Interstate Commerce Act the Commission possesses jurisdiction to determine that the participation of rail carriers operating within the United States in single-factor joint through rates to points in official territory while participating in combination through rates made over points within the United States on a higher level for like service from the same Canadian origins to points in the south, was unduly prejudicial to receivers in southern territory and unduly preferential of competing receivers in official territory

The Commission's report of May 7, 1958 (R. 60), found that the involved rates were unlawful on two grounds: (1) that they were unduly prejudicial to the complaining receivers and unduly preferential of their competitors in official territory, in violation of section 3(1) of the Interstate Commerce Act, and (2) that the assailed rates were unjust and unreasonable in violation of section 1 of the act.[13] On the same date, the Commission issued an order under section 3(1) of the Act in which it found that the rates on crude asbestos from the Canadian origins to "certain destinations in the United States, are and for the future will be, unduly prejudicial to the complainants [southern receivers] and unduly preferential of the complainants' competitors to the extent indicated in

[13] The Commission also found that the complaining receivers had been damaged as a result of the maintenance of unlawful rates by the rail carriers and reparation was awarded.

said report of even date" (R. 81). Accordingly, it ordered the defendant rail carriers, to the extent that they participated in the transportation of asbestos within the United States, to cease and desist from practicing the unlawful rate discriminations[14] (R. 81).

The District Court completely overlooked the fact that the order of the Commission entered May 7, 1958, was an order promulgated under section 3(1) of the Act. It treated the matter as one arising solely under the provisions of section 1 of the Act and restricted its considerations to "a single question * * * Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States" (R. 242). In resolving this question adversely to the Commission, the District Court simply held "that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of inter-

[14] The order of the Commission dated March 11, 1959 (R. 239–240), pointed out that:

> * * * The report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central Mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under section 1 of the Interstate Commerce Act and to the award of reparation.

This left to the rail carriers the right to determine how the rates should be adjusted to remove the unlawful discriminations. *Texas & Pacific Ry. Co. v. United States*, 289 U.S. 627.

change is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate" (R. 253).

Assuming that this question may be relevant in determining the validity of the Commission's finding that the assailed rates were unjust and unreasonable under section 1 of the Act, it has no relevance to the Commission's separate finding under section 3(1) of the Act of the existence of an unduly prejudicial-preferential rate relationship and the requirement of its elimination. "Both rates may lie within the zone of reasonableness and yet result in undue prejudice." *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524. However, the District Court apparently viewed the single question as stated by its as dispositive of both phases of the case, for its opinion contains no discussion of the section 3(1) issue, and it denied a motion for reconsideration which pointed out its failure to treat with the separate issue of undue prejudice and preference under that section (R. 253–261).

The evidentiary basis for the Commission's finding of the existence of an unduly prejudicial-preferential rate relationship is not challenged by the rail carriers.[15] Instead, they urge, in effect, that the Commis-

[15] As the Court below noted in its opinion, "* * * plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if those rates are to be viewed as an indivisible entity. Plaintiff's argument before this court is confined to the contention that the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas" (R. 244–245).

sion's lack of jurisdiction to determine the lawfulness of the assailed rates under section 1 of the Act also prevents the Commission's exercise of authority under section 3(1) of the Act where the complainants fail to assail the local rate factors from Newport and East Alburgh, Vt., to the southern destination points. However, "proceedings to remove unjust discrimination are aimed directly only at rate relations," *United States* v. *Illinois Central Ry. Co., supra,* p. 520, *St. Louis S.W.R. Co.* v. *United States,* 245 U.S. 136, 145.

While the Commission may not have authority to compel the establishment of international single-factor joint rates for the future, nevertheless, "the prohibition of the third section * * * is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers * * *." *East Ten. etc. Ry. Co.* v. *Interstate Commerce Commission,* 181 U.S. 1, 18. Where, as here, the carriers voluntarily have entered into single-factor joint through rates from Canadian origins to points in official territory,

> * * * we entertain no doubt that our control over them empowers us to require them to cease and desist from participating in an existing joint rate, or to find their participation in a proposed joint rate not justified, if we find such rates are or will be unreasonable or otherwise unlawful. *The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. But proof should not be confused with responsibility.* [*Cyanamid and*

Cyanide from Niagara Falls, 155 I.C.C. 488, 491–492] [Emphasis supplied]

The fact that the traffic involved in this case originates in Canada does not nullify the power of the Commission under section 3(1) of the Act to require domestic rail carriers which effectively participate in a major portion of the through transportation (R. 75) to cease and desist from perpetuating the unlawful rate relationship, especially when, as here, the preferred lower rates to official territory are single-factor *joint* through rates in which they expressly concur.

The contention of the rail carriers is invalid on its face for another reason. In the instant case, a through route was established to these southern points over which combination rates made over points in the United States applied, and the transportation is performed as a result of this arrangement between the carriers, express or implied. "Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove unjust discrimination exists in both classes of cases." *United States* v. *Illinois Cent. Ry. Co., supra*, p. 527. Thus, in *St. Louis, Brownsville & Mexico Ry. Co. et al.* v. *Brownsville Navigation District et al.*, 304 U.S. 295, 300, this Court held that:

> * * * *The Act extends to transportation only so far as it takes place in this country.* Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. *But that freedom from obligation*

does not imply that, in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. Cf. *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U.S. 654. [Emphasis supplied.]

In *Mayo Shell Corp.* v. *Baltimore & O. R. Co.*, 297 I.C.C. 133, a case substantially similar to the instant proceeding, except that the transportation was in the reverse direction, and the combination rates broke on the border, the Commission pursuant to section 3(1) of the Act required the rail carrier defendants to remove the unlawful discrimination existing against the movement of oyster shell from Houston, Tex., to points in Canada. The facts indicated that shippers at Houston were unduly prejudiced by the application of a combination through rate on a higher level to points in New England and eastern Canada, and that competing shippers at Berwick and Morgan City, La., were unduly preferred by the application of a lower single-factor joint through rate to the same destination. The Commission stated at page 135:

> The duty of a carrier to give substantially equal treatment to all shippers who are in a position to demand it includes the right to reach competitive markets on relatively equal terms. A rate preference may not be accorded a shipper without a material difference in transportation conditions justifying the preference. An unjustified difference in freight rates that are factors in the competition between shippers constitutes undue prejudice and preference

> where, as here, the rates are under the effective control of the participating carrier or carriers.
> * * *

With respect to that portion of the transportation in Canada, the Commission as it did in the instant case simply held (p. 135):

> Portions of the transportation at the assailed rates occur in Canada, and several of the defendants are Canadian carriers. We have jurisdiction only over such of the transportation as takes place within the United States, and our order herein will be directed only against the defendant carriers engaged in such transportation.

See also *Consolidated Mining & S. Co. of Canada* v. *N.Y.C. R. Co.*, 299 I.C.C. 231, where the Commission held that even a Canadian shipper was entitled to nondiscriminatory rates under section 3(1) of the Act. In the latter case, the Commission found that the Canadian shipper at Tadanac, British Columbia, 6.75 miles north of the international border, was unduly prejudiced by the assessment of charges based upon a combination through rate over United States points on a higher level to eastern United States points, and that competing shippers at Bradley, Idaho, and Anaconda, Mont., were unduly preferred by the application of a lower single-factor joint through rate to the same destinations.[16]

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[16] The Commission also said in the *Consolidated Mining* case (p. 244):

> The fact that Tadanac lies beyond the international boundary and other circumstances incidental thereto but which do not concern the service under the rates considered

In the instant case, the Commission, after comparing the rate relationship existing between the complaining receivers in the south and competing receivers in official territory, the competitive factors, and after making appropriate findings regarding the intrinsic merits of the two rate levels, held (R. 76):

> It is clear that the complainants' competitors at Ambler and other destinations in official territory are being unduly preferred to the undue prejudice and disadvantage of the complainants, and that the assailed rates are and have been unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to destinations in the United States. * * * As stated, we have no authority to prescribe for the future joint through international rates from origins in Canada, but we may order the removal of any unlawfulness in rates on in-

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herein, are not germane to the issues. Nor does the fact, also stressed by defendants and interveners, that shipments have continued to move from Tadanac to the destination territory in substantial and increased volume despite the rate disparity complained of rebut the showing of undue preference and prejudice. A patent discrimination in rates is not to be condoned because other competitive advantages and disadvantages wholly unrelated to the service of transportation may favor a shipper complaining of such discrimination. When sales are made under keen competition in common markets, as they are here, the correlative of the advantage gained from the lower rate level must be a detriment or injury to a competitor who must ship on the higher level. *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry. Co.*, 201 I.C.C. 165, 206 I.C.C. 445; sustained in *Chesapeake & O. Ry. Co.* v. *United States*, 296 U.S. 187. Compare *Illinois Central R. Co.* v. *United States*, 101 F. Supp. 317, 323.

ternational traffic to the extent that the transportation takes place within the United States."[17]

Since these carriers are the "common source of the discrimination" an "order for correction of the disparity," may "run against * * * them." *Texas & Pacific Ry. Co.* case *supra*, 289 U.S. at 650. See also *Ayrshire Corp. v. United States*, 335 U.S. 573, 594.

The rail carriers operating within the United States which participate in the transportation of asbestos originating at the Canadian mines are unlawfully discriminating against the southern shippers by the participation in single factor through joint rates on a substantially lower level to competing receivers in official territory, thereby refusing to accord substantially the same or equal rate treatment to the adversely affected southern shippers. "While the carriers may therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is

[17] The Commission report also notes (R. 71) that the defendant rail carriers "admit * * * that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation."

unlawful." *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 637."

The Commission's lack of power over the transportation of asbestos moving within Canada does not affect its jurisdiction over the transportation of this commodity by rail carriers once it crosses the international boundary into the United States. *Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627, 636. "The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." *New York* v. *United States,* 331 U.S. 284, 296. Section 3(1) of the Act was designed to prevent unlawful rate discriminations such as those existing in the present case. The failure of the lower court to sustain the Commission's orders in this respect would frustrate the "great purposes of section 3(1)." *New York* v. *United States,* 331 U.S. 284, 315. As applied to international traffic, the effect of the district court's opinion is to immunize from regulation precisely what section 3(1) of the Act has empowered the Commission to prevent, i.e., undue and unreasonable prejudice and disadvantage between shippers and territories. In addition, it will enable the rail carriers to extend this form of rate discrimination proscribed by the Congress to other international traffic. Thus, the opinion of the lower court creates a large loophole in

[16] Although the defendant rail carriers alleged before the Commission that the disparity in rate treatment resulted historically from water competition, they were unable to adduce evidence in support of this assertion, and the Commission specifically found that: "There is no indication that water competition has any bearing on the maintenance of the present adjustment * * *." (R. 71).

the law, contrary to the intent and purpose of the Interstate Commerce Act.

> * * * If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent. (*New York* v. *United States*, 331 U.S. 284, 342–343)

For these reasons the order of the Commission promulgated under section 3(1) of the Act is valid in all respects and should be sustained.

II

The District Court erred in holding that the Commission lacks jurisdiction to determine under Section 1 of the Interstate Commerce Act that a combination rate on through traffic from Canadian origins to destinations in the southern States was unjust and unreasonable "insofar as the transportation took or takes place within the United States"

A. Preliminary statement on jurisdictional issues

The brief filed by the United States in this case urges reversal of the decision below insofar as it sets aside the Commission's orders of May 7, 1958, and March 11, 1959, to the effect that the maintenance by the appellee carriers of joint rates from Canadian points of origin to shippers in official territory at a lower level than the combination rates from such origins to shippers at points in the southern States, violates section 3(1) of the Interstate Commerce Act.

The Commission concurs entirely with this position of the Department of Justice.

However, fn. 5 in the brief of the United States suggests that the issue of the appellee's liability for reparations, and the underlying basis for the Commission's determination that appellees were liable for reparations—i.e., that the combination rates to southern consignees were unjust and unreasonable under section 1(5) of the Interstate Commerce Act, were not properly in issue before the three-judge court below or in this Court upon direct appeal. The lower court itself stated, citing 28 U.S.C. 2321 and 49 U.S.C. 16(2), that "We are, of course, without authority to consider the validity of the Commission's orders allowing reparations; * * *" (R. 244). At the same time, that court proceeded to hold that the Commission lacked jurisdiction over the rates involved, without confining its reasoning to the Commission's order based upon section 3(1).

Under 28 U.S.C. 2321, three-judge district courts are without jurisdiction to review orders of the Commission for the payment of money. Section 16(2) of the Interstate Commerce Act provides that a Commission order for payment of reparations is enforceable by suit upon such order in the one-judge federal district court or in a state court. *United States* v. *I.C.C.*, 337 U.S. 426, 442–443 holds that a Commission order denying reparations should be reviewed by a one-judge district court. Typically, when the Commission determines that a rail carrier is liable for reparation, it directs the complainant to comply with Rule 1.100 of its General Rules of Practice (as it did

in the instant case (R. 78)). Upon compliance with that Rule, which is designed to obtain agreement as to the amount of reparation, the Commission enters a formal order directing the carrier to pay a specified sum of money. If the carrier refuses to pay, it is upon this order that the shipper brings suit under section 16(2).

In the present case, the railroad appellees' challenge to the Commission's order based upon section 3(1) was properly reviewed by a three-judge district court, with a direct appeal to this Court. Although, as the United States points out in its brief (pp. 8–9), the question which the court below purported to decide is not relevant to the section 3(1) issue, it is relevant to the issue of reasonableness of rates which underlies the Commission's determination that the appellee railroads were liable for reparations—notwithstanding that court's disavowal of jurisdiction "to consider the validity of the Commission's orders allowing reparations."

Whether the three-judge court below, notwithstanding its disclaimer, could have determined a question which is relevant only to the issue of reparations, depends upon (1) whether consideration of such a question is premature until the Commission issues a specific reparations order following compliance with its Rule 1.100, and (2) whether questions relating to liability for reparations must be severed from the section 3(1) issues (as to rates for the future) to be triable only in an action brought by the shipper under section 16(2). To permit the railroad appellees to challenge in a single action before a three-judge court

all of the issues which the Commission resolved against them, would certainly be convenient for them and, perhaps, for other parties. By analogy, in *Magnet Cove Barium Corp.* v. *United States,* 175 F. Supp. 473, affirmed 361 U.S. 32, a shipper was permitted to challenge in a three-judge court a Commission order which both denied reparations on past shipments and refused to prescribe rates for the future. Contra, *Shippers Car Supply Committee* v. *United States,* 160 F. Supp. 939, affirmed 358 U.S. 45, in which the denial of reparations was separately reviewed by a single judge.

In terms of the present case, our immediate concern, if this Court concurs in the suggestion of the United States, is that nothing in the opinion of the court below shall stand as *res judicata* on issues relating solely to reparations if those issues are later presented to another forum—as in a suit by a shipper under section 16(2). In that event, we submit that the decision below should be vacated insofar as it determines issues which are relevant only to reparations. On the other hand, if this Court rejects the suggestion of the United States, we contend below that the lower court erred in holding that the Commission lacked jurisdiction to determine the reasonableness of the rates in question.

B. The merits

In this case, the Commission had before it the formal complaints of shippers which placed in issue the lawfulness of the entire combination through rate made over interior points within the United States.

Both factors of this combination through rate were filed with the Commission by the rail carriers, and were made applicable on this traffic (asbestos and related commodities) from Canadian origins to destinations in the South. The receivers also requested the prescription of lawful rates for the future and for the award of reparations on shipments made during the statutory period of limitations (R. 62–63). The Commission for many years has uniformly held [19] with respect to similar complaints raising section 1(4) and 1(5) issues that:

> Where a through rate is made up of separately established components, the lawfulness for the future of any of the components independent of the other, may be passed upon, *but where there is an issue as to reparation on past shipments the total through charges must be considered.* See *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458. [*Bell Oil & Refining Sales Co.* v. *Denver & R.G.W.R. Co.*, 277 I.C.C. 135, 138 (1950).] [Emphasis supplied.]

This rule of law was firmly established by the Commission in 1916 when it held in *Stevens Grocer Company, et al.* v. *St. L., I.M. & S. Ry. Co.*, 42 I.C.C. 396, 398: [20]

> * * * It is important that the true rule be definitely announced and that a uniform policy be

[19] With minor exception cf. *Cairo Board of Trade* v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 (1917), which involved a separately established *reshipping* rate on grain and grain products. Such rates apply to a *fictional through movement* from points where grain is reshipped after being stopped and stored. See also *Allendale Grocery Co.* v. *Charleston & W.C. Ry. Co.*, 147 I.C.C. 131, 134 (1927).

[20] The rate charged in the *Stevens Grocer Co.* case was "on

established under which parties complainant and defendant may understand what is required. *We now lay down the rule, which for the future will be strictly adhered to, that when a complaint involves charges applicable to a through shipment the through rate or charge must be brought in issue and the participating carriers must be made defendants. When the through rate or charge is made up of separately established rates or charges, applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof;* in such case the complainant should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors. * * *

* * * * *

Proportional rates are necessarily parts of through rates and differ from local rates used as parts of through rates in that before the proportional rate may be attacked at all there must be an allegation that the through rate is unreasonable because of the unreasonableness of the particular proportional rate; whereas local rates, as such, may be attacked separately when used separately. *The Interior Iowa Cities Case,* 28 I.C.C. 64. [Emphasis supplied.]

The Commission went on to hold that:

Local rates, however, when used as parts of through rates partake of the nature of propor-

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the basis of combinations of intermediate rates [local and proportional rates] based on Memphis." 42 I.C.C. 396.

> tional rates, and may be regarded as, in effect, local and proportional rates. * * * So far as they are strictly local rates they may, of course, be brought in question without questioning the propriety of any other rate; in so far as they are used in through transportation they should be treated as other proportional rates and may not be considered unless the through rate be attacked as a whole.

The rule requiring that the through rate be put in issue where the complaint involves charges on through shipments has been uniformly applied to international traffic. *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654; *News Syndicate Co.* v. *N.Y.C. RR.*, 275 U.S. 179.[21] Since the receivers' only interest is that the charge shall be reasonable as a whole, the complaints properly put in issue the applicable combination through rate.

In restricting itself to the question whether the Commission has jurisdiction "over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin

[21] In *E. A. Brown Produce Co.* v. *Atchison, T. & S.F. Ry. Co.*, 278 I.C.C. 433, the Commission held at p. 436:

> * * * Whether the movement is domestic or international, the through charge to the shipper, and not divisions of the joint through rate nor the individual factors composing a combination rate, is what determines the reasonableness of the through rate. See *Great Northern Ry.* v. *Sullivan*, *supra*, wherein, in annulling an award of reparation of this Commission based upon a finding of unreasonableness in the domestic factor of an international combination rate, the Court said:

to a border interchange within the United States" (R. 242) the District Court misconceives the rate situation before the Commission. The District Court adopted the argument of the rail carriers that "the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas" (R. 244–245). When the District Court accepted this premise, it simply disregarded the fact that the assailed rates which are the only *applicable* rates on this through traffic from the Canadian origins to points in the South consisted of combination through rates made over interior points within the United States. The District Court thereupon proceeded to treat the rate situation as though the rail carriers had in fact made available to the complaining receivers a rate applicable from the international boundary line on this through traffic moving from the Canadian origins to the south. This is the same theory which this Court rejected in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654. There

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"The shipper's only interest is that the charge shall be reasonable as a whole."

Again, in *Crown Willamette Paper Co.* v. *Southern Pac. Co.*, 218 I.C.C. 279, 281:

> Evidence relating to one factor of a through rate does not prove by itself the unreasonableness of the through rate. The shipper's only interest is that the charge shall be reasonable as a whole. [Citing *Great Northern Ry. Co.* case, *supra.*]

The rail carriers in the instant case merely compared the applicable assailed combination through rate with rates on the same commodities from East Alburgh and Newport, Vt., to other points in the South in support of their position (R. 71).

this Court reversed the lower court which had found that the rail carriers had a published rate on the commodities from the international boundary which had not been declared to be unreasonable by the Commission. Nevertheless this Court held that this was no defense where the only applicable rate consisted of the joint through rate on the through shipments. Thus, this Court held (p. 663):

> The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment "originating" at Nogales or at the point where the line of the foreign carrier and that of the defendant touch the boundary or in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers *local transportation* only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not apply to the American part of the transportation of an international shipment on a through bill of lading. It is to be presumed that if any tariff covering that part of the through service existed, defendant would have produced it and, in view of the facts shown, the burden was upon the carrier to bring forward evidence that

a rate therefor had been established as required by the Act. It follows that the lower court erred in distinguishing this case from the *News Syndicate Co. v. New York Cent. R. Co., supra.* That case controls this one.

To the extent that this Court in the *Lewis-Simas* case, *supra,* held the rail carriers to the applicable rate on the through shipment, it is the controlling precedent here. See also *News Syndicate Co. v. N.Y.C. R.R.*, 275 U.S. 179, 187. Here it must be emphasized that no rate was applicable from the international boundary. In fact, no rate of any kind was even published from the international boundary that had any application to this traffic. This is abundantly clear from the fact that the rail carriers actually collected charges based on the combination through rate made over interior points within the United States.

The report of the examiner on further hearing (R. 177) clearly stated the rule when he found (R. 191-192) that:

> The defendants err, therefore, when they contend that their rates southbound from Newport and East Alburgh are in fact rates applicable from the border. The Commission has jurisdiction to determination [sic] the lawfulness of combination rates based upon a point within the United States, to the extent that the total transportation takes place within the United States. * * * The complainants are entitled to just, reasonable, and otherwise lawful rates applicable to transportation within the United States, and *they are likewise entitled to*

> *assail the lawfulness of the actual rates available to them for all of such transportation, rather than, as contended by the defendants, only the factors applicable from East Alburgh and Newport.* [Emphasis supplied.]

Pursuant to the clear and unequivocal mandate of the provisions of section 1(1) (a) and (2) of the Act, 49 U.S.C. 1(1) (a) and (2), the Commission's jurisdiction extends to the "transportation of * * * property wholly by railroad * * * from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States." The Commission held (R. 75) that:

> * * * *We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication.* [Emphasis supplied.]

It further defined its jurisdiction by stating that (R. 72–73):

> Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear [fol. 87] alternative with respect to their participating in international traffic. They may publish rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S.

179; *Buckerfield's* v. *Atchison, T. & S.F. Ry. Co.*, 280 I.C.C. 15. *We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants.* [Emphasis supplied.]

In the instant case, the rail carriers had no rate in effect applicable to this through traffic from the international boundary to the southern receivers. If such a rate was in existence, and none was alleged by them, it would have been their duty to produce it. "The burden was upon the carrier[s] to bring forward evidence that a rate therefor had been established as required by the Act." *Lewis-Simas* case (p. 663). The only applicable rate in effect and the only one upon which the charges were based is the combination through rate made over the interior points in the United States, namely East Alburgh and Newport, Vt. Since the rail carriers were unable to produce an applicable rate on this through traffic from the international boundary, they attempted to move the international boundary down to the rate break points, thereby creating the fiction that Newport and East Alburgh were points on the international boundary.

However, the Commission in considering this contention of the rail carriers expressly found (R. 73) that the rate break points

> * * * *Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the*

> *United States.* The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States. [Emphasis supplied.]

The Commission admitted (R. 73):

> While it is true, as stated by the defendants, *that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary* * * * [Emphasis supplied.]

In that connection, the Commission cited several cases in which it held that its jurisdiction extended over transportation from and to the international boundary.

The District Court attempted to distinguish these cases on the ground that the cited Commission cases involved "joint rates over which the Commission's jurisdiction is conceded" (R. 250). But this is completely beside the point, since the District Court was simply confusing the secondary question of *liability* for the establishment and maintenance of unlawful rates, with the primary issue of *jurisdiction* over transportation. So far as the Commission's jurisdiction is concerned, it is immaterial whether one carrier, as in this case, or more than one carrier participates in the transportation of the through traffic from origins in Canada across the international

boundary to the rate break-interchange point *within the United States.* The Commission's jurisdiction attaches by virtue of the fact that the traffic moves to the rate break points either under a single rate over the line of a single carrier, as here, or under a *joint* rate applicable over the lines of two or more carriers. Certainly no one would seriously challenge the Commission's jurisdiction if the rate break point were 50 or 100 miles south of the border, or even 500 to 600 miles to Richmond, Va., as was established in *Durham Herald Co., Inc.* v. *Canadian Pacific Ry. Co.*, 280 I.C.C. 534.

Perceptive reading of the Commission's decision will indicate that the cited cases (R. 73–74) were intended to support only the proposition that the Commission had jurisdiction over transportation to and from the international boundary. The District Court conceded that (R. 252–253):

> * * * If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. * * *

Nevertheless the District Court concluded that with respect to the rates assailed by the complainants, the Commission had no jurisdiction. (R. 253). In the face of express findings of the Commission to the contrary, the District Court merely concluded that (R. 249):

> * * * the fact that interchange occurs a few miles on one side of the boundary as opposed

> to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. * * *

We submit that such a doctrine of *de minimis* is inconsistent with the basic jurisdictional definitions of sections 1(1)(a) and 1(2) of the Act and the District Court's concession regarding the Commission's jurisdiction under other sections of the Act (R. 252–253). By adopting the fiction, rejected by the Commission, that the rate break points should be considered as being on the international boundary, the District Court effectively cut off the complaining receivers' right of action to which they were entitled, i.e. "to assail the lawfulness of the *actual rates available to them for all of such transportation,* rather than, as contended by the defendants [rail carriers] only the factors applicable from East Alburgh and Newport" (Report of the Examiner on further hearing R. 192).

The extremely complex and highly technical rate situation in this case demonstrates that the Commission's decision in the instant case must be construed in the light of the record before it. Any inconsistency with other decisions by the Commission, as to whether a particular interchange point near the border should be considered as a border point for determining jurisdiction, does not constitute a basis for upsetting this order of the Commission on this record. As this Court pointed out in *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 665–666:

> * * * This court has no concern with the correctness of the Commission's reasoning, with

> the soundness of its conclusion, or with the alleged inconsistency with findings made in other proceedings before it. [Emphasis supplied.]

The District Court was obviously impressed with the contention of the rail carriers made to the Commission (R. 75), "that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh," because it concluded that the Commission "would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional * * * proportional rate from the border * * * to the * * * points of interchange" (R. 248 ftn. 11). The Commission in its report simply held "but we do not perceive how this would affect the situation" (R. 75). Regardless of the manner of publication, the rail carriers would have had to prove that such a rate existed, and that it was applicable to the through shipments covered by the complaints. As we pointed out above, the applicable rate here is the assailed combination through rate made over interior points within the United States. The fact that it is a through route to which a through rate applied is incontestable. *Thompson* v. *United States,* 343 U.S. 549, 557; *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 572–573; *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 666. See also *Kansas City So. Ry.* v. *Albers Comm. Co.,* 223 U.S. 573, 597–598, where this Court held:

> * * * By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. * * *

The rail carriers did not choose to question the evidentiary findings made by the Commission to support its conclusions that the assailed through combination rates were unjust and unreasonable [22] for the past under section 1(4) of the Act. Therefore, the only issue presented on this phase of the appeal is whether the Commission possessed jurisdiction under section 1(4) of the Act to determine the lawfulness of the assailed combination through rates made over interior points within the United States applicable on the through traffic from origin points in Canada to points in the South.

It is clear from what we have said above that the Commission does possess such jurisdiction. It then follows as a corollary that under the provisions of section 1(5) of the Act unjust and unreasonable rates on this traffic are "prohibited and declared to

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[22] The District Court pointed out that (R. 244–245):

> * * * plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if these rates are to be viewed as an indivisible entity. *Plaintiffs' argument* before this court is confined to the contention *that the Commission exceeded* [fol. 291] *its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas.* [Emphasis supplied.]

be unlawful," and pursuant to section 16(1) of the Act, 49 U.S.C. section 16(1), the Commission is authorized to award damages to the affected complainants.

The finding of the Commission in this respect is applicable to all of the rail carriers which participated in the transportation within the United States, and its effectiveness in the matter of affording relief for damages is no different than if the transportation had been entirely domestic. Lack of control over the foreign portion of the haul is of no legal significance where the rail carriers participate in through routes and either (1) joint through rates or (2) through combination rates based on points within the United States:[23] *Virginian Ry.* v. *United States,* 272 U.S. 658, 665; *Ayrshire Corp.* v. *United States,* 335 U.S. 573, 594; *New York* v. *United States,* 331 U.S. 284. In this respect, liability attaches regardless of the method of rate publication, i.e., a single factor joint rate, *Great Northern Ry. Co.* v. *Sullivan,* 294 U.S. 458; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U.S. 654; *News Syndicate Co.* v. *N.Y.C. R.R. Co.,* 275 U.S. 179; *Louisville and Nashville R. Co.* v. *Sloss-Sheffield Co.,* 269 U.S. 217, or a combination through rate *Atlantic & Y. Ry. Co.* v. *Carolina Button*

[23] The District Court gave as its second reason for reversing the Commission (R. 249):

> * * * if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

Corp., 74 F. 2d 870; *Atlantic Coast Line R. Co.* v. *Smith Bros.* 63 F. 2d 747, cert. denied 289 U.S. 761.

In the latter case (*Atlantic Coast Line R. Co.* case) no joint through rate was available to the complaining shipper on shipments to Florida. Instead the shipments moved on a combination through rate made up of several different class rates. Smith Bros., the complaining shipper, challenged the lawfulness of the entire combination through rate and obtained an award of reparations for the overcharges against all of the participating rail carriers. The initial and connecting carriers attempted to absolve themselves from liability by alleging (p. 747) "that the overcharge was not their act, but the act of the terminal carrier which had collected the freight [sic], and since they neither published nor exacted the improper rate they cannot be held liable." The Texas & Pacific Ry. Co. offered to prove (p. 748) that "it got only the rate that it would have been entitled to under the tariff."

It was urged upon the court that the fact that the shipments moved on a combination through rate rather than a joint rate did not make all of the participating carriers (p. 747) "partners in responsibility, each for the acts of the others, but to make each responsible for what it unlawfully does." Consequently, they argued, that since they received only their lawfully published rate, the terminal carrier which had collected more than the amount found to be just and reasonable by the Commission should alone be required to pay the reparations.

These contentions did not impress the Court of Appeals. It held that there was no evidence in the record (p. 748) "that the terminal carriers in collecting the through rate, acted on their own initiative, or collected more or other than the rate consented to by the initial and intermediate carriers." [24]

The opinion of the Court of Appeals goes on to point out (p. 748) that unlike other cases where the Commission expressly has found that the fault lay entirely with a specific carrier, in the case before it, the Commission had found the entire combination through rate unlawful and that "all the carriers had participated in the injustice." Under these circumstances, the court held (p. 748) that:

> It is the settled rule of the Commission that, "if a through rate, joint or combination, is found unreasonable and reparation is awarded the order entered runs against the carriers, collectively, that participated in the transportation." Pinson Brokerage Co. v. C. & G. R.R. Co., 89 I.C.C. 126; Hansen-Peterson Co. v. A., T. & S.F.R. Co., 113 I.C.C. 575; Illinois Powder Co. v. Chicago, P. & St. L.R. Co., 165 I.C.C. 127. This rule has the approval of the courts. Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 46 S. Ct. 73, 70 L. Ed. 242; News Syndicate Co. v. N.Y. Central R. Co., 275 U.S. 187, 48 S. Ct. 39, 72 L. Ed. 225; Lewis-Simas-Jones Co. v. So. Pac. Co., 283 U.S. 654, 51 S. Ct. 592, 75 L. Ed. 1333;

[24] In the instant case before the court, the record does not indicate otherwise.

Kanawha Black Band Coal Co. v. Chesapeake & O.R. Co., 107 W. Va. 469, 148 S.E. 855.[25]

In *Atlantic & Y. Ry. Co.* v. *Carolina Button Corp.*, 74 F. 2d 870, Judge Parker was confronted with an allegation similar to that urged upon the court in the *Atlantic Coast Line R. Co.* case, *supra*. It was contended that since the shipments were made on a combination through rate, whose factors consisted of separately established local rates rather than a joint through rate, that the participating rail carriers could not be held jointly and severally liable. The carriers admitted that a joint rate would have been collected and distributed among them in the same way as was the combination through rate. The mere fact that in one instance there may exist an express contract between the rail carriers participating in the through movement rather than an implied agreement was considered by Judge Parker to be a difference with no legal distinction, for as he held (pp. 873–874):

> * * * Where an unreasonable joint through rate is filed, there is an express agreement between the participating carriers to do that which the Commerce Act condemns; where the unreasonable through rate is made up by com-

[25] See also *Riverside Mills* v. *Augusta & Savannah Steamboat Company*, 40 I.C.C. 501, 502 (1916); *Alabama Grocery Company of Huntsville, Ala.* v. *Atchison, Topeka & Santa Fe Railway Company*, 197 I.C.C. 726, 728 (1933) on further hearing 206 I.C.C. 559, 561 (1935). In *Atlantic Lumber Co.* v. *Louisville & N.R. Co.*, 157 I.C.C. 236 (1929), the Commission awarded reparations against carriers engaged in transportation within the United States on shipments moving on a combination through rate from points in the United States to Canada, such combination having been made over Cincinnati, Ohio.

> bination of locals, such agreement is necessarily implied. The participation is the same in the one case as in the other; and we see no reason for a difference with respect to the liability of the participants.

Although the District Court, in the instant case, censured the Commission's decision for failing to apportion its finding of unlawfulness between the domestic and the Canadian transportation (R. 248), Judge Parker in the *Carolina Button Corp.* case did not find an equivalent situation insuperable. He held (p. 872) that:

> * * * Certainly, there is no reason why the failure of the Commission to direct the apportionment among the carriers of the through rate, which it prescribes as reasonable, should be held to invalidate its action in establishing such rate or in *condemning a prior through combination rate as unreasonable.*[26]

Thereafter, Judge Parker spelled out the underlying principle for holding liable in damages all the participating rail carriers in an unlawful combination through rate. He held (pp. 872–873):

> And we think it equally clear that, where a combination through rate is declared unreason-

[26] It has been the Commission's policy for many years in cases of this type not to apportion damages between the participating rail carriers. The order is for a gross sum and runs against all of the carriers. If the carriers are unable to agree to an apportionment amongst themselves, they can apply to the Commission for a determination of the matter. *Riverside Mills* v. *Augusta & Savannah Steamboat Company*, 40 I.C.C. 501, 502 (1916). A contrary policy would impose a impractical and insurmountable burden on the shipper to institute a multitude of suits for enforcement of the Commission's order in many jurisdictions.

able by the Commission, damages may be awarded for the exaction of the rate against all of the carriers who have participated therein. Because of the duty of the carriers to establish through routes and just and reasonable rates and charges, *the exaction of an unreasonable combination rate is a violation of the act, even though, as a result of their failure to promulgate reasonable joint through rates, such combination rate may be the only rate lawfully applicable to the shipment. For such violation the carriers are liable in damages; and we think that all who have participated in the through rate are jointly and severally liable, just as in the case of any other joint tort. It is true that in such case they have not participated in the publication of an unreasonable joint rate in violation of the act, as in the case of Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 46 S.Ct. 73, 70 L.Ed. 242; but they have participated in what is the real wrong in violation of the act, i.e. they have participated in charging and have shared in the division of the rate held by the Commission to be unreasonable.* Lewis-Simas-Jones Co. v. Southern Pacific Co., 283 U.S. 654, 660, 51 S.Ct. 592, 75 L.Ed. 1333. Section 8 of the Interstate Commerce Act, 49 U.S.C.A. § 8, would seem to settle the liability of all of the participating carriers in such case. * * * [Emphasis supplied.] [27]

To summarize, we submit that all of the railroads who participate in maintaining unjust and unreason-

[27] The provisions of section 8 of the Act, 49 U.S.C. 8 are set forth in the Appendix, *infra*, p. 49.

able combination rates are jointly liable to the shippers from whom charges based upon such rates were collected; that in the case of a combination rate upon international traffic, that liability exists under section 1 of the Interstate Commerce Act "to the extent that such transportation takes place within the United States;" that where the Canadian railroads perform line haul transportation service under their separately established rates to interchange points located three and five miles within the United States, the American railroads may not validly contend that only their separately established rates from the interchange points to the south are subject to the Act—and that the Commission is without authority to determine the reasonableness of the entire combination rate. Any other conclusion would remove a substantial amount of international traffic over important routes from effective rate regulation for the protection of American shippers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed, with directions to dismiss the complaint.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

Interstate Commerce Act, 49 U.S.C. 1 et seq.:

Section 1 (1)(a) and (2) (49 U.S.C. § 1 (1)(a) and (2)).

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment;

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States,

Section 1(4) (49 U.S.C. § 1(4)).

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such

carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 1(5) (49 U.S.C. § 1(5)).

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(1) (49 U.S.C. § 3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage

in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6(1) (49 U.S.C. § 6(1)).

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such

form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Section 6(7) (49 U.S.C. § 6(7)).

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8 (49 U.S.C. § 8).

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery,

which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 16(1) (49 U.S.C. § 16(1)).

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Section 16(2) (49 U.S.C. § 16(2)).

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

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